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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ROBERT L. MONTGOMERY,

Petitioner,

v.

G. RAYMOND TRISLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There is no entitlement to punitive damages. When criminal or civil fines are meted out as punitive damages to punish for wrongdoing which are grossly disproportional to the gravity of any offense alleged, and bear no relationship to compensatory damages, cruel and unusual punishment is inflicted, and when judicially imposed by a state court are state sanctioned.

The question presented is whether the United States Constitution requires punitive damages awarded by juries and approved by courts without reduction or remittitur to be proportional to the gravity of the offense allegedly committed, and in a proportional ratio to the compensatory damages awarded.

Whether excessive court imposed punitive damages without reduction or remittitur, denies a person's equal protection of the laws guaranteed by the Fifth Amendment made applicable to states by the Fourteenth Amendment?

Whether court imposed excessive punitive damages, without reduction or remittitur, denies a person his or her inalienable rights against excessive fines and cruel and unusual punishment prohibited under the Eighth Amendment to the United States Constitution made applicable to the states under the Fourteenth Amendment?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Robert L. Montgomery is a disabled World War II Veteran who was ordered to lay down his life, if need be, for his country on the battlefields of Africa and Italy during World War II. He is living in his eightieth year, and in the twilight of his life, had his Estate taken from him by punitive damages imposed judicially against him, which with interest added, increased the punitive damages to punish him in excess of Two Million Dollars ($2,000,000).

This Petition is a plea to the Honorable Supreme Court of the United States to grant Montgomery's Petition for a Writ of Certiorari to the Supreme Court of Indiana, to show cause why Robert Montgomery's Estate of $1,967,760.88 and his earnings that took his lifetime to accumulate, were not unconstitutionally taken from him, without due process of law by contingent fee lawyers and court imposition, without any notice as to what tort he allegedly had committed.

The Respondent G. Raymond Trisler suffered no pecuniary damages. Once he was awarded compensatory damages of Fifteen Thousand Dollars ($15,000) by the jury, he was compensated for all that he was entitled to receive as a matter of Indiana law.

A punitive damages award of $1,967,760.88, when added to compensatory damages of Fifteen Thousand Dollars ($15,000) awarded by the same jury the previous day, is a civil financial windfall grossly disproportional to any tort allegedly committed, and when judicially imposed by Indiana Courts, becomes a State imposed penalty sanction, made applicable to the States by the Fourteenth Amendment to the United States Constitution.

As a state imposed sanction, punitive damages of $1,967,760.88 with eight percent (8%) interest annually compounded, were assessed against Robert Montgomery solely to punish him for a lawsuit filed by Executive Builders, Inc. against Respondent G. Raymond Trisler for intentional business interference, who retaliated by adding Robert Montgomery as a Third Party Defendant, to reach his accumulated lifetime savings by asserting a Counterclaim/ Third Party Complaint against Robert Montgomery, who was a 28% shareholder and corporate officer of Executive Builders, Inc. acting within the scope of his duties.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	3
Constitutional Provisions Involved	3
Statutory Provisions Involved	4
Statement of the Case	5
Indiana Public Policy	7
Constitutional Provisions Involved	9
Reasons for Granting the Writ	11
I. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of This Court And Other Federal Courts.	13

Contents

Page

II. The Decisions Of The Indiana Supreme Court And Indiana Court Of Appeals Do Not Give Notice, Nor Define What Acts Are Punishable Under Readily Ascertainable Standards Of Criminality Or Guilt. 15

III. A Ratio Of 131.94+ Punitive To Compensatory Damages Violates The Guidelines Of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 674, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). 16

IV. Prejudgment Interest Is Not Awardable On Punitive Damages Under Ind. Code Sec. 34-51-4-3. 18

The Decisions Below are Unmistakably Incorrect ... 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

CASES

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) .... *passim*

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 674, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) 8, 11, 16

Creative Demos, Inc. v. Wal-Mart Stores, Inc., 955 F. Supp. 1032 (S.D. Ind. 1997) 14

Durham Ex. Rel. Estate of Wade v. U-Haul, 745 N.E.2d 755 (Ind. 2001) 17

Jeffrey Lane, et al. v. Hughes Aircraft Company, 22 Cal. 4th 405 (CA 2000) 15

Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975 (Ind. 1993) 2

Saenz v. Fidelity Guaranty Ins. Underwriters, 925 S.W.2d 607 (Tex. 1996) 14

Weems v. United States, 217 U.S. 349 (1909) 10

Cited Authorities

Page

CONSTITUTION, STATUTES, AND RULES

United States Constitution, Amendment V ..... i, 2, 4, 9

United States Constitution, Amendment VIII ... i, 2, 4, 9

United States Constitution, Amendment XIV .... *passim*

Indiana Constitution, Article 1, Section 16 ..... 8, 9

Indiana Code, Sec. 34-34-4-34-4 14

Indiana Code, Sec. 34-43-5-3 14

Indiana Code, Sec. 34-51-3-1, *et seq.* 4

Indiana Code, Sec. 34-51-3-4, *et seq.* 5

Indiana Code, Sec. 34-51-3-5 5

Indiana Code, Sec. 34-51-3-6 .....4, 16, 19

Indiana Code, Sec. 34-51-4-3 18

Indiana Code, Sec. 35-5002-7 14

28 U.S.C. § 1257(c) 4

28 U.S.C. § 2674(c) 5

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeals Of Indiana Dated And Filed July 25, 2002 ..... 1a

Appendix B — Opinion Of The Court Of Appeals Of Indiana Dated December 6, 2000 ..... 13a

Appendix C — Judgment Of The Shelby Circuit Court Dated And Filed October 18, 1999 ..... 33a

Appendix D — Letter To John Raikos From Clerk Of The Supreme Court, Court Of Appeals, And Tax Court, State Of Indiana Denying Appellant's Petition For Transfer Of Jurisdiction Dated November 7, 2002 ..... 35a

Petitioner respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgment of the Indiana Supreme Court that denied Transfer of Jurisdiction, and affirmed the Judgment of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The Indiana Supreme Court Denied Transfer on November 7, 2002. The Court did not decide, nor address the merits of the Appeal, nor did it address the sole determinative issue *de novo*, of punitive damages that were in a ratio of 131.19 times compensatory damages of Fifteen Thousand Dollars ($15,000) challenged by Petitioner as the Issue on appeal. The Supreme Court of Indiana in Denying Transfer of Jurisdiction, let stand the Judgment of the Indiana Court of Appeals, even though the Court of Appeals in its OPINION multiplied such ratio of punitive damages of $1,967,760.88 to $15,000 incorrectly as being a *9 to 1 ratio* instead of the correct *131.19 times* ratio of punitive damages to compensatory damages that was the outcome determinative issue on appeal. Moreover, punitive damages that were 131.19 times more than the compensatory damages, were also grossly disproportional to any tort allegedly committed.

When interest at eight percent (8%) per annum is added and compounded to punitive damages awarded, and are judicially imposed, punitive damages become State sanctioned. The Indiana Court of Appeals without *de novo* review refused to reduce or order remittitur of the Jury's award of $1,640,000. The $1,640,000 was added to the $15,000.00 amounting to a jury award of $1,655,000, which violated Indiana's declared Public Policy and is contrary to Petitioner's inalienable rights to equal protection of the laws,

guaranteed to him under the Fifth Amendment to the United States Constitution, and his rights against excessive punishment that when judicially imposed is cruel and unusual punishment prohibited by the Eighth Amendment, made applicable to the States under the Fourteenth Amendment.

The Indiana Court of Appeals affirmed the Judgment of the Trial Court. Interest on punitive damages increased the punishment to $1,960,760.88 that was judicially ordered forfeited from Robert Montgomery's Estate to be paid solely to Respondent G. Raymond Trisler in violation of Indiana's Public Policy that punitive damages not exceed a 3 to 1 ratio or $50,000.

The Indiana Supreme Court Denial of Transfer on November 7, 2002 in Cause No. 73A01-0203-CV-00103, [Lower Court Number 73C01-8803-CP-057] is attached hereto as Appendix "D".

The Supreme Court of Indiana on November 7, 2002 contrary to the Supreme Court's previous decision, that once a plaintiff has been awarded compensatory damages he or she has been awarded all that he or she is entitled to receive as a matter of law in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.* 608 N.E.2d 975, 983 (Ind. 1993), DENIED Appellant's Petition to Transfer Jurisdiction and let stand the Judgment of the Indiana Court of Appeals that affirmed punitive damages in a ratio of 131.19 times the compensatory damages of $15,000, which it allowed to be added to the compensatory damages.

The Opinion of the Indiana Court of Appeals affirming the punitive damages award of $1,967,760.88 in favor of Respondent G. Raymond Trisler, without any reduction or

remittitur, was entered on July 25, 2002, and is attached hereto as Appendix "A". The Opinion of the Indiana Court of Appeals, dated December 6, 2000, and referred to as Trisler II, is attached as Appendix "B".

The original Judgment on Jury Verdict, dated October 18, 1999, is attached hereto as Appendix "C".

STATEMENT OF JURISDICTION

The Supreme Court of the United States has appellate power to revise, reverse, and remand a judgment of the Supreme Court of a State, under appellate power exercised independently of an adjudication by the Supreme Court of a State, especially in redress of a litigant who feels himself aggrieved by some particular state legislation, whether or not such statute enacted by the Legislature of the State of Indiana, was construed by the Indiana Supreme Court, as though it excluded Petitioner from its operation, and denied Petitioner the equal protection of the laws to which he is entitled.

CONSTITUTIONAL PROVISIONS INVOLVED

There is no entitlement to punitive damages. No plaintiff is entitled to punitive damages. When *excessive* criminal or civil fines are awarded as punitive damages to punish for wrongdoing, cruel and unusual punishment is inflicted when grossly disproportional to the gravity of any offense allegedly committed, and become State sanctioned when judicially approved and imposed.

Is the State of Indiana recognized as a joint participant when it has insinuated itself into collecting Seventy Five

Percent (75%) of all punitive damages awarded in Indiana, that a punitive damages award cannot be considered to be so "purely private" as to fall outside the scope of the Fourteenth Amendment.

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(c), for a right, privilege, and immunity, protected by the equal protection of the laws under the due process clause of the Fifth Amendment to the United States Constitution. Jurisdiction is invoked under the Eighth Amendment to the United States Constitution prohibiting excessive fines grossly disproportional to the gravity of any alleged criminal or civil offense inflicted as cruel and unusual punishment, made applicable to the States by the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED

State action is present when a State participates in the collection of punitive damages awarded. By Indiana statute, Seventy Five Percent (75%) of all punitive damages awarded in any civil case on and after July 1, 1998 are ordered payable to the Indiana State Treasurer ". . . who shall deposit the funds into the violent crime victims compensation fund . . ." enacted as Indiana Public Policy in 1995, and amended by Ind. Code Title 34-51-3-6(b)(2). Title 34-51-3-1, *et seq.* [Public Law 1-1998, Sec. 47] and was in effect on June 8, 1999, the date, punitive damages were awarded against Robert Montgomery. The statute provides in pertinent part:

34-51-3-1 "*Applicability of Chapter.* — This chapter applies *to all cases in which a party requests the recovery of punitive damages in a civil action.*" . . . (Emphasis supplied).

34-51-3-4 "*Limitations on punitive damage award.* — A punitive damage award may not be more than the greater of:
(1) three (3) times the amount of compensatory damages awarded in the action; or
(2) fifty thousand dollars ($50,000)."

34-51-3-5 "*Reduction of punitive damage award.* — If a trier of fact awards punitive damages that exceed the limitation under section 4 [I.C. 34- 51-3-4] of this chapter, the court shall reduce the punitive damage award to no more than the greater of:
(1) three (3) times the amount of compensatory damages awarded in the action; or
(2) fifty thousand dollars ($50,000.00)."

The United States of America under Title 28 U.S.C. § 2674, Tort Claims procedure, as a matter of federal public policy, exempted itself from paying *interest on punitive damages*, stating in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims. . *but shall not be liable for interest . . . for punitive damages . . .*" (Emphasis added).

STATEMENT OF THE CASE

The Respondent G. Raymond Trisler was awarded Fifteen Thousand Dollars ($15,000) in compensatory damages. Once a plaintiff has been awarded compensatory damages, he or she has been awarded all that he or she is entitled to receive, as a matter of law in the State of Indiana.

The Trial Court requested the same Jury on June 8, 1999 that awarded the $15,000 compensatory damages to hear Respondent G. Raymond Trisler's claim for punitive damages, limited solely to the perceived wealth of the Estate of Robert Montgomery, erroneously presented by Deposition taken the night before and read to the Jury as being $16,000,000 net.

Respondent's Counsel handled the case on a substantial contingent fee arrangement and invoked a biblical theme for the jury to award punitive damages in the biblical amount form of a "*ten percent (10%) religious tithe*" to send a message to everyone, that ". . . frivolous law suits will not be tolerated in Shelby County, Indiana."

In its rush to judgment, the Trial Court allowed only the perceived wealth of Robert Montgomery could be presented to the Jury on June 8, 1999 under a Deposition ordered to be taken of Robert Montgomery on June 7, 1999. The jury hearing only the wealth of Robert Montgomery was persuaded by Counsel's biblical request for a Ten Percent (10%) tithe, to return a punitive damages verdict of $1,640,000 added to the Fifteen Thousand Dollars ($15,000) compensatory damages awarded the previous day, that provided Respondent G. Raymond Trisler, *with a private financial windfall of $1,655,000* to be shared with his contingent fee attorneys.

Interest at eight (8%) percent per annum compounded, was added to the punitive damages as costs, and increased Robert Montgomery's punishment to $1,967,760.88. This entire amount, without reduction, abatement of interest, remittitur, or diminution for payment to the State of Indiana, was ordered on June 8, 1999, by the Trial Court, affirmed by

the Court of Appeals, and Petition To Transfer Denied by the Indiana Supreme Court, to be paid directly to Respondent, in total disregard of the Public Policy of the State of Indiana and the statute in full force and effect on that day, that by Public Policy required Seventy Five Percent (75%) of the punitive damages awarded to be paid to the State of Indiana, leaving only Twenty Five Percent (25%) payable to a prevailing plaintiff.

Indiana Public Policy

Indiana Public Policy on June 8, 1999, by Indiana statute, limited *all punitive damages* awarded in any civil action to be disbursed Twenty Five Percent (25%) effective July 1, 1998 to the prevailing plaintiff, enacted as Public Law 1, Section 47, and directed the remaining Seventy Five Percent (75%) of all punitive damages awarded to be paid by the defendant to the Treasurer of the State of Indiana, and separately deposited in a Victims of Violent Crimes Fund.

The alleged offense was the filing of a "frivolous" law suit by Executive Builders, Inc. against Respondent G. Raymond Trisler, which four (4) months later was adjudicated by the Trial Court to be "not frivolous". A punitive damages award of $1,967,760.88 was judicially imposed as a civil fine in a ratio of 131.19 times the Fifteen Thousand Dollars ($15,000) compensatory damages and is grossly disproportional to the gravity of any offense committed, or to other comparable punitive damages awards.

The $1,967,760.88 civil fine to punish Robert Montgomery was not reviewed as to excessiveness *de novo* by the Indiana Court of Appeals, nor by the Indiana Supreme Court *de novo* on Petition to Transfer Jurisdiction. Neither

Appellate Court addressed nor commented on the merits of the outcome determinative issue raised on appeal that the maximum 3 to 1 ratio of compensatory damages to punitive damages, not to exceed $50,000, was the declared Public Policy of the State of Indiana as enacted by the Legislature.

The $1,967,760.88 punitive damages fine was not reduced nor trimmed in any way, nor did it comply with existing Indiana Public Policy expressed by Legislative Mandate that in Indiana capped *all punitive damages* in the State to not exceed a ratio of punitive damages to compensatory damages of three (3) to one (1), or $50,000.00 whichever is greater, and that Seventy Five Percent (75%) of all punitive damages be paid, not to the prevailing party, but to the State of Indiana.

This Indiana Public Policy of a three (3) to one (1) ratio, is strikingly similar to that ordered by the Supreme Court of the United States in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 674, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).

Respondent G. Raymond Trisler under oath, at trial, testified that he personally could not recall any specific act of Robert Montgomery, as to which it caused him [G. Raymond Trisler] to suffer any out-of-pocket expenses for any mental, physical or financial impairment, and that the only thing that he suffered was only generic "*mental anguish-all types*" without sustaining monetary damages.

ARTICLE I, Section 16 of the Indiana Constitution recites that "All penalties shall be proportioned to the nature of the offense". Robert Montgomery was never informed of the nature or cause of any accusation against him that could

visit him with a punitive damages punishment fine of $1,967,760.88 payable to G. Raymond Trisler who had suffered no monetary damages, and had already been awarded $15,000 in compensatory damages which was all that he was entitled to receive.

Robert Montgomery during the enforcement phase of the punitive damages award, held before Shelby Circuit Court Judge Charles D. O'Connor, sat in the presence of two armed Deputy Sheriffs seated near Robert Montgomery during the entire hearing. Upon conclusion of the hearing, Robert Montgomery requested Judge O'Connor to tell him what alleged crime or tort he had committed, that justified the very substantial penalty of $1,967,760.88 that was being levied against Robert Montgomery and his Estate in violation of ARTICLE I, Section 16 of the Indiana Constitution.

Judge O'Connor could not inform Robert Montgomery as to what offense he had committed, nor could Judge O'Connor tell Robert Montgomery why he had approved the entire punitive damages award without reduction, abatement of interest, or remittitur to comply with the declared Indiana Public Policy.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V [1791]: No person shall be . . . deprived of . . . property without due process of law . . .

AMENDMENT VIII [1791]: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV [1868]: *Section 1*. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court of the United States in *Weems v. United States*, 217 U.S. 349, 378-382 (1909) held that "*. . . the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature.*"

Excessive punishment in this case constitutes cruel and unusual punishment, sanctioned by Judge Charles D. O'Connor, whose Judgment was affirmed without reduction or remittitur by the Court of Appeals and by the Supreme Court of Indiana on Petition to Transfer Jurisdiction.

This Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), held that "*punitive damages awards must be reviewed for excessiveness*," and that the *size* of the punitive damages awarded in that case was such that the *result* violated the due process clause of the Fourteenth Amendment on substantive grounds. (517 U.S. 568). The size of punitive damages awarded in this case is 131.19 times compensatory damages, and violates the Public Policy of Indiana, and the Statute enacted to cap and to limit punitive damages to a three (3) to one (1) ratio or $50,000.

REASONS FOR GRANTING THE WRIT

The Decision Below affects all grossly excessive punitive damages awarded nationwide, that are wholly unrelated to any tortious or criminal offense, are state sanctioned, by judicial imposition, without a *de novo* hearing, wholly unrelated to compensatory damages awarded, which require this Court's Immediate Intervention to protect and prevent irreparable harm inflicted upon innocent persons left without any remedy under state law.

The Petition should be granted for two reasons. *First*, the Decision of the Indiana Supreme Court denying Transfer of Jurisdiction, let stand the Judgment of the Court of Appeals, that affirmed the Judgment of the Trial Court, which as a practical matter did not decide, nor review *de novo* the *sole* outcome determinative question raised on appeal, whether a *131.19 to 1 ratio*, in excess of the three (3) to one (1) ratio Indiana Public Policy statutory cap of punitive damages to compensatory damages, was grossly excessive, that requires reversal, and an appropriate order for reduction and remittitur.

Secondly, the parameters of excessive punitive damages were delineated by this Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* decided on May 14, 2001 that gave guidance to all State Courts as to the limit of excessive punitive damages judicially. This Court re-visited *BMW v. Gore*, and said:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that

> will subject him to punishment but also of the severity of the penalty that a State may impose.

Punitive damages have been described as "quasi criminal", and when enforced judicially by state courts as "private fines", become state imposed. The Indiana Legislature in this case mandated that Seventy Five Percent (75%) of all punitive damages be paid to the State which makes punitive damages "State Sanctioned".

Robert Montgomery did not receive any fair notice that $1,967,760.88 as a quasi-criminal fine could be levied against him in excess of the Indiana Public Policy cap on *all* punitive damages that by statute were limited to a three (3) to one (1) ratio effective on July 1, 1998 and in effect on June 8, 1999.

Robert Montgomery did not receive fair notice that a judgment based on a jury's perception of his wealth, falsely presented by opposing counsel comparing Robert Montgomery to billionaire Bill Gates, could be used against him.

Robert Montgomery did not receive any fair notice that $1,967,760.88 in punitive damages could be awarded to punish him in order to provide Respondent G. Raymond Trisler with a financial windfall that would be *131.19 times* greater than the compensatory damages of Fifteen Thousand Dollars ($15,000), which when once paid, awarded all of the compensatory damages that he was entitled to, as a matter of Indiana law.

Robert Montgomery did not receive any fair notice that $1,967,760.88 could be based solely upon the Robert

Montgomery's perceived wealth without regard to doing equal justice to the poor and to the rich, that was not applied by the Indiana Supreme Court in allowing such Judgment to stand.[1]

I.

CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

The State Statute capping punitive damages was enacted by the Indiana Legislature in 1995, and was amended effective July 1, 1998 and in effect on June 8, 1999, when the jury awarded punitive damages against Appellant.

The Statute mandated that Seventy Five Percent (75%) *of all punitive damages, without any exception, shall be paid to the Treasurer of the State of Indiana.*

Punitive damages are "*an expression of moral condemnation*" and are to be limited to an amount necessary to deter, and to punish. Punitive damages cannot be added to, or tacked on, to increase compensatory damages previously awarded. The punitive damages of $1,967,760.88 bear a numerical relationship of punitive damages is *131.19 times* greater than the compensatory damages awarded of Fifteen Thousand Dollars ($15,000), and is a number picked out of the blue by the jury that it judicially mandated be paid,

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1. The Judicial Oath prescribed for the Chief Justice of the United States Supreme Court, modified over the years, still requires that the Chief Justice to swear or affirm, that "*I . . . do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich . . . under the Constitution and laws of the United States, so help me God.*"

which at first blush is excessive and disproportional to any alleged civil fine.

As stated by the Texas Supreme Court "*. . . juries could not simply pick a number and put in the blank*" . . . "*there must be evidence that the amount found is fair and reasonable compensation.*" in *Saenz. Fidelity Guaranty Ins. Underwriters*, 925 S.W.2d 607 (Tex. 1996), *reh. overruled.*

In 1997, prior to the passage of the Act declaring public policy to take effect on July 1, 1998, a federal district court in Indiana, on public policy grounds, vacated a punitive damages award against *Wal-Mart Stores, Inc.*, a multi-billion dollar company engaged in interstate commerce throughout the United States.[2]

The Federal court in *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032 (S.D. Ind. 1997), noted that the events giving rise to that case occurred prior to 1995, and that the Statute Ind. Code 35-43-5-3, 35-5002-7, and 34-34-4-34-4 were not applicable because the Statute was not effective until July 1, 1995. The Federal Court, by Chief Judge Barker, delayed ruling on the post-trial motions until the Supreme Court of the United States handed down its decision in *BMW of North America, Inc. v. Gore*, __U.S. __, 116 S. Ct. 1589, 135 L. Ed. 2d 809 (1996), and said at p. 1044:

> Thus, the jury's $6,500,000.00 punitive damages award appears to be radically out of line with Indiana

2. On Public Policy grounds, a jury's punitive damages award for $6,500,000 was vacated, where it was found to be radically out of line with Indiana public policy set by the Indiana legislature that capped punitive damages for comparable misconduct and the Indiana tort reform law. *Creative Demos, Inc. v. Wal-Mart Store, Inc.*, 955 F. Supp. 1032 (S.D. Ind. 1997).

public policy as evidenced by the damages set by the Indiana legislature for comparable misconduct and by Indiana tort reform law.

II.

THE DECISIONS OF THE INDIANA SUPREME COURT AND INDIANA COURT OF APPEALS DO NOT GIVE NOTICE, NOR DEFINE WHAT ACTS ARE PUNISHABLE UNDER READILY ASCERTAINABLE STANDARDS OF CRIMINALITY OR GUILT.

Neither the Indiana Court of Appeals, nor the Supreme Court of Indiana applied *de novo*, the "*highly deferential*" standard required for punitive damage awards to be approved under *BMW v. Gore* as to reprehensibility and comparable punitive damage awards and the compensatory damage award.

First, the "*degree of reprehensibility*" here was not great, *Second*, "*there was no reasonable relationship between the punitive damage award and the compensatory damage award*".

The punitive damages award of $1,640,000 ordered paid exclusively to Respondent G. Raymond Trisler as additional compensatory damages bears no reasonable relationship to any alleged misconduct, and *Third*, "*the civil penalties for similar misconduct are far lower*".

The Supreme Court of California in *Jeffrey Lane, et al. v. Hughes Aircraft Company*, 22 Cal. 4th 405 (CA 2000) reversed the Judgment of the Court of Appeals of the Ninth Circuit in that case upon the ground that the Court of Appeals for the Ninth Circuit did not apply the highly deferential standard required under *BMW v. Gore*.

Neither the Indiana Supreme Court, nor the Indiana Court of Appeals, apply the highly deferential standard required by *BMW v. Gore*, and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* nor invoke the statute on public policy grounds and order a reduction or remittitur. The Statute, Indiana Code Sec. 34-51-3-6, was enacted in 1995, and was in place in June 1999 in full force and effect.

III.

A RATIO OF 131.94+ PUNITIVE TO COMPENSATORY DAMAGES VIOLATES THE GUIDELINES OF *COOPER INDUSTRIES, INC. v. LEATHERMAN TOOL GROUP, INC.*, 532 U.S. 674, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).

BMW v. Gore was revisited by the Supreme Court of the United States on May 14, 2001 in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, wherein the Court by *Rehnquist, C.J., and O'Connor, Kennedy, Souter, Thomas and Breyer, JJ.*, joined. *Thomas J.* filed a concurring opinion. *Scalia, J.*, filed an opinion concurring in the judgment. *Ginsburg, J.*, filed a dissenting opinion. The Court held in an 8 to 1 decision that the constitutionality challenge of awards of punitive damages as to *excessiveness* is to be determined under a *de novo* standard of review, rather than an *abuse-of-discretion standard*, and said:

> *Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendants wrongful conduct, but punitive damages are private fines intended to punish the defendant and deter future wrongdoing. A jury's assessment of the former is essentially a factual*

> *determination, but its imposition of the latter is an expression of its moral condemnation. . . . the Fourteenth Amendments Due Process Clause imposes substantive limits on the States discretion, making the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States Furman v. Georgia, 408 U.S. 238, and prohibiting States from imposing grossly excessive punishments on tortfeasors,. e.g., Gore, 517 U.S. at 562.*

In *Durham Ex. Rel. Estate of Wade v. U-Haul*, 745 N.E.2d 755, 764 (Ind. 2001), the Indiana Supreme Court described punitive damages as:

> Punitive damages are simply one element of damages, little of which ends up in the hands of the plaintiff. See *Ind. Code Sections 34-51-3-1 to -6 (1998)* (requiring, among other things, that seventy-five percent of punitive damages awards be placed in the victims compensation fund). *Moreover, there is no entitlement to punitive damages. Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362-63 (Ind. 1982) 'It has never been implied that a plaintiff has any entitlement to [punitive] damages. Rather, he is merely the fortunate recipient of the 'windfall.'. (Emphasis added).

IV.

PREJUDGMENT INTEREST IS NOT AWARDABLE ON PUNITIVE DAMAGES UNDER IND. CODE SEC. 34-51-4-3.

I.C. 34-51-4-3. *Exception for punitive damages.* — This chapter does not *impose liability for prejudgment interest on any part of a judgment that is awarded as punitive damages. [P.L. 1-1998, Sec. 47].*

The Indiana Legislature chose to permit awards of punitive damages, but drastically limited the amount of recovery a prevailing plaintiff can receive. The statute provides notice to potential claimants that they will not be entitled to recover *all* punitive damages awarded, *nor recover any prejudgment interest thereon.*

Respondent G. Raymond Trisler was on notice of the statutory public policy, and knew he was not entitled to prejudgment interest on punitive damages.

Respondent G. Raymond Trisler knew as a matter of law that Indiana Public Policy in effect since 1995, mandated he would receive no more than Twenty Five Percent (25%) of a punitive damages award, subject to remittitur of Seventy-Five percent (75%) that was due and payable to the Treasurer of the State of Indiana by Robert Montgomery. Robert Montgomery is entitled to a remittitur of Seventy Five Percent (75%) of his money taken from him by judicial imposition and ordered paid directly to G. Raymond Trisler for additional compensatory damages.

The statute specifically provides that a *defendant* must tender the entire punitive damage award to the court clerk, who will then allocate the award between the State and the plaintiff. Ind. Code Sec. 34-51-3-6. Allowing punitive damages to be awarded ensures that wrongdoers will be punished, and potential wrongdoers will be deterred. On the other hand by providing for a distribution of Seventy Five Percent to Twenty Five Percent (75%-25%) to the State, the statute seeks to prevent windfalls to plaintiffs, including the grossly excessive financial windfall of $1,967,760.88 that was added to the $15,000.00 compensatory damages already paid to G. Raymond Trisler that when awarded, was all that he was entitled to receive as compensatory damages. G. Raymond Trisler should be ordered to remit the entire $1,967,760.88 plus interest to Robert Montgomery.

THE DECISIONS BELOW ARE UNMISTAKABLY INCORRECT

The United States Supreme Court should summarily reverse on the merits, the Judgment of the Indiana Supreme Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF INDIANA DATED AND FILED JULY 25, 2002

IN THE COURT OF APPEALS OF INDIANA

No. 73A01-0203-CV-103

ROBERT MONTGOMERY,

Appellant-Third-Party Defendant and Garnishee Defendant,

v.

G. RAYMOND TRISLER,

Appellee-Defendant, Third-Party Plaintiff and Judgment Creditor.

APPEAL FROM THE SHELBY COUNTY CIRCUIT COURT
The Honorable Charles D. O'Connor, Judge
Cause No. 73C01-8803-CP-57

July 25, 2002

OPINION - FOR PUBLICATION

MATHIAS, Judge

In 1987, Executive Builders filed a lawsuit against G. Raymond Trisler ("Trisler") for intentional interference with business. Trisler denied all allegations and proceeded

to file a counterclaim against Executive Builders along with a third-party seven-count complaint against Robert and Dolores Montgomery, who were owners of Executive Builders. Trisler sought damages for defamation, invasion of privacy, abuse of process and frivolous litigation. After a jury trial, the jury entered a judgment in favor of Trisler, and while Executive Builders, Dolores, and Robert were all ordered to pay certain compensatory damages to Trisler in varying amounts, only Robert was ordered to pay 1.6 million dollars in punitive damages. Robert appealed and our court affirmed the judgment of the trial court.[1]

After Trisler was unable to collect a portion of the judgment, he filed a motion for proceedings supplemental. A hearing was held on the motion, and the trial court entered several orders of garnishment against various garnishee-defendants ordering them to produce documentation of any of Robert's property held by the garnishee-defendant or any indebtedness owed from the garnishee-defendant to Robert. Robert appeals raising several issues, which we consolidate and restate as: whether the award of punitive damages and the post-judgment interest on the punitive damage award violate Indiana public policy and constitute excessive fines, as well as cruel and unusual punishment in violation of the United States Constitution.[2] In his Appellee's brief, Trisler requests sanctions pursuant to Indiana Appellate Rule 66(E).

---

1. *See Executive Builders, Inc. v. Trisler*, 741 N.E.2d 351 (Ind. Ct. App. 2001), *trans. denied.*

2. In his Appellant's Brief, Robert purportedly raises thirteen issues for our review. However, in the argument section of his brief,

(Cont'd)

We affirm and remand for proceedings consistent with this opinion.

Facts and Procedural History

This cause of action commenced in 1987, and this is the third appeal in its fifteen-year history. *See Trisler v. Executive Builders, Inc.*, 647 N.E.2d 390 (Ind. Ct. App. 1995), *trans. denied*; *Executive Builders, Inc., v. Trisler*, 741 N.E.2d 351 (Ind. Ct. App. 2001), *trans. denied* (hereinafter "*Trisler II*"). Many of the pertinent facts are found in *Trisler II*, as follows:

> The facts most favorable to the verdict are that Executive Builders, which was owned by Robert and Dolores Montgomery and a number of other individuals, purchased some real property in Greenwood in a development area known as Cielo Vista. The plan was to subdivide the property into sixty-lot units of condominium housing. While the estimated value of the land was approximately $900,000, Executive paid a purchase price of $310,000 for its lots. Trisler owned and rented three of the seventeen units that had already been sold. In 1985, he moved to an adjoining subdivision but continued to rent his Cielo Vista units.

(Cont'd)

Robert only presents cogent arguments for the issue noted above; therefore, those issues are waived. See *Hollowell v. State*, 707 N.E.2d 1014, 1025 (Ind. Ct. App. 1999) (observing that failure to present cogent argument constitutes waiver of issue for appellate review); Ind. Appellate Rule 46(A)(8)(a).

At one point, Dolores took it upon herself to amend certain Homeowner's Association (Association) documents in the subdivision to "properly reflect" the corporate status "as viewed by Executive Builders." *Trisler*, 647 N.E.2d at 391. Prior to Dolores's actions, Trisler had attempted to revive the Association by having another homeowner in the subdivision file an annual corporate report with the Indiana Secretary of State. In response, Executive appointed and/or elected a "purported" new Board of Directors and Officers for the Association. *Id.* Robert served as the self-appointed chairman of the Association. Dolores and other members of Executive were designated to serve three-year terms on the Association's Board of Directors. Record at 3429.

In May 1986, the Association placed a "special assessment" against the original seventeen unit owners, purportedly for repairs to the property. Approximately one year later, the Association attempted to place liens against the units on the basis of unpaid regular monthly assessments for the period between 1980 and 1985.

Trouble began to brew with respect to the levying of such "assessments" and Trisler, who believed that the charges brought by the Association were improper, consulted with legal counsel. Thereafter, Trisler maintained that the Board of Directors had been improperly appointed and that Executive owed the Association "thousands of dollars." R. at 2476.

In response, Robert immediately began accusing Trisler of wrongdoing. For instance, Robert sent a letter to all homeowners indicating that Trisler was desiring to "keep him and his friends in the rental property business and to protect their investments at your expense." R. at 3163-64. Robert sent additional correspondence to the property owners alleging that Trisler "would just as soon turn this community into a slum rental project." R. at 2863. After Robert discovered that his written correspondence had not produced any favorable result to him, he filed a complaint in the trial court on December 11, 1987, against Trisler, alleging "Intentional Interference with Business." R. at 51. The allegations asserted that Trisler had advised the homeowners in the development to withhold payment of their monthly fees and that he interfered with the Association "on an ongoing basis." R. at 59. Executive also maintained that Trisler utilized attorneys to create artificial legal obstacles, such as challenging the validity of all meetings of the Association and generally impeding the progress of Executive. R. at 59. Moreover, Executive asserted that Trisler deterred potential customers from making purchases of the condominium properties and maintained that Trisler's actions were done with the willful intent to injure and damage Executive which entitled it to punitive damages. R. at 63.

Trisler denied all allegations and proceeded to file a counterclaim against Executive Builders along with a third-party seven-count complaint against

Robert and Dolores. Trisler sought damages for defamation, invasion of privacy, abuse of process and frivolous litigation. The trial court eventually entered summary judgment in favor of Trisler upon the complaint for business interference that Executive had filed against him.

Robert and Dolores continued their attack on Trisler. On February 7, 1988, the purported minutes of the annual meeting of the Association, held on June 14, 1987, were typed and distributed to the homeowners. Dolores was responsible for the contents of all such newsletters to the homeowners. R. at 2280. That newsletter cast Trisler in a derogatory and unfavorable light. R. at 2852-56.

Although summary judgment for Trisler was entered on February 21, 1990, the trial court vacated its order on March 31, 1994, in accordance with Executive's request. Trisler then appealed that order to this court, where we reversed the trial court and remanded the cause with instructions that the original judgment be reinstated with respect to the interference claim. *Trisler*, 647 N.E.2d at 394.

Following remand, Trisler's counterclaim and third-party complaint against Executive proceeded to trial on June 28, 1999. At the close of all evidence, Executive filed a motion for a directed verdict on the grounds that "Trisler did not, and could not identify any act that was committed individually by Robert . . . and/or Dolores." Appellant's Brief at 24.

> The motions were denied and the jury proceeded to return verdicts in Trisler's favor against Executive Builders in the amount of $143,240, against Robert in the sum of $15,000 and against Dolores for $20,000, for a total judgment award of $178,240. Thereafter, a hearing was held on the issue of punitive damages. During that phase of the trial, it was determined that Robert's assets exceeded $16 million, the assets of Executive Builders was in a negative amount totaling hundreds of thousands of dollars and that Dolores earned an annual income of $15,000. Neither Robert nor Dolores appeared at that juncture of the trial nor offered testimony in rebuttal of the asset values that had been established.
>
> On June 8, 1999, the jury awarded punitive damages against Robert in the amount of $1.64 million and no punitive damages against Executive Builders or Dolores. The following day, Executive requested the trial court to vacate the jury award with respect to the total damage award. These motions were denied on October 18, 1999, and the trial court proceeded to enter judgment in the amount awarded by the jury. Thereafter, the trial court denied Executive's motion to correct error on December 22, 1999.

Id. at 354-55 (citations omitted). Robert raised several issues on appeal in *Trisler II*, including whether the award of punitive damages was erroneous. Specifically, he argued that

> the judgment [of punitive damages] may not stand because there was no showing that his actions were malicious, oppressive and intentional. Moreover, Robert maintains that the award violated his rights to due process under the United States Constitution and Indiana Constitution in that the amount awarded was impermissibly excessive.

Id. at 359-60. Our court held that the evidence was sufficient to support an award of punitive damages and a punitive damage award of ten percent of Robert's total economic wealth was not impermissibly excessive. *Id.* at 361. Therefore, we affirmed the trial court on that issue, as well as the other issues raised by Robert in *Trisler II*.[3]

Eventually, Trisler was able to collect 1.6 million dollars of the judgment, but a portion of the judgment remained unpaid. Therefore, on January 8, 2002, Trisler filed a motion for proceedings supplemental to collect the remaining balance on the judgment and accrued interest totaling over $300,000. Appellant's App. p. 62. A hearing was held on the motion on February 14, 2002. On that same day, the trial court entered several orders of garnishment ordering various companies, banks, and brokerage firms in which Robert had an interest or account to produce documentation to the court by March 14, 2002, regarding any of Robert's property held by the Garnishee-Defendant or any indebtedness owed from the Garnishee-Defendant to Robert. Appellant's App. pp. 76-89.

3. After his petitions for rehearing and transfer were denied, Robert pursued a Petition for Writ of Certiorari in the United States Supreme Court, which was denied. Appellee's App. p. 21.

Robert also filed a notice of appeal on February 14. However, on February 20, 2002, Trisler filed a notice of satisfaction of judgment, which provided:

> the Judgment entered against Robert Montgomery herein by this Court on October 19, 1999, has been fully paid and satisfied, and the parties to this cause of action would now request the Court to so notify the Clerk of Shelby County to show the aforesaid Judgment to be satisfied as a matter of record.

Appellee's App. p. 22. Robert filed his Appellant's Brief on March 18, 2002.[4] Trisler then filed his Appellee's Brief in which he requested damages pursuant to Indiana Appellate Rule 66(E).

Discussion and Decision

Robert argues that the punitive damage award, and the post-judgment interest on that award, is an excessive fine in violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Indiana public policy. He therefore contends that the trial court erred when it entered orders of garnishment as requested by Trisler during proceedings supplemental to satisfy the remaining unpaid balance of the punitive damage award. Trisler argues that the law of the case doctrine prevents Robert from raising this issue on appeal.

---

4. Robert's motion for oral argument is hereby denied.

> Under the law of the case doctrine, an appellate court's determination of a legal issue is binding both on the trial court on remand and the appellate court on a subsequent appeal, given the same case with substantially the same facts. All issues decided directly or implicitly in a prior decision are binding on all subsequent portions of the case. The doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided. The doctrine is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter.

Humphreys v. Day, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000), *trans. denied* (citations omitted).

In *Trisler II*, Robert argued that the punitive damage award was erroneous because there was no showing that his actions were malicious, oppressive, and intentional. *Trisler*, 741 N.E.2d at 359-60. He also contended that "the award violated his rights to due process under the United States Constitution and Indiana Constitution in that the amount awarded was impermissibly excessive." *Id.* at 360. Affirming the trial court, our court determined that there was sufficient evidence to support the punitive damage award and it was not excessive. Therefore, we agree with Trisler that the law of the case doctrine bars re-litigation of the issue of whether the punitive damage award was excessive.

Also, in *Trisler II*, Robert failed to raise the argument of whether the interest on the punitive damage award was excessive in violation of the United States Constitution and

Indiana public policy, and therefore, the issue is waived. "[A]n issue ripe for review, but not raised in the first appeal, will be considered as finally determined and will be deemed affirmed." *Mafnas v. Owen County Office of Family & Children*, 699 N.E.2d 1210, 1212 (Ind. Ct. App. 1998), *trans. denied* (citing *Citizens Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 582 N.E.2d 387, 391 (Ind. Ct. App. 1991)). Furthermore, because Trisler filed a notice of satisfaction of judgment in the trial court, the issue is moot. *See Ind. High Sch. Athletic Ass'n, Inc., v. Durham*, 748 N.E.2d 404, 410 (Ind. Ct. App. 2001) (stating "[w]hen the principal questions in issue have ceased to be matters of real controversy between the parties, the errors assigned become moot questions and the court will not retain jurisdiction to decide them").

Finally, Trisler argues that due to the "horrendously frivolous and blatantly bad faith nature" of Robert's conduct in this appeal, he is entitled to damages under Indiana Appellate Rule 66(E). Br. of Appellee at 16. Rule 66(E) provides:

> The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution.

In addition, this court is authorized to award attorney fees pursuant to Indiana Code section 34-52-1-1 when a party continues to litigate a claim after it becomes frivolous, unreasonable or groundless. Ind. Code § 34-52-1-1 (1999).

However, we note that "[i]n exercising our discretionary power . . . we must use extreme restraint due to the potential chilling effect upon the exercise of the right to appeal." *Walker v. Pillion*, 748 N.E.2d 422, 427 (Ind. Ct. App. 2001) (citation omitted).

In this appeal, Robert is attempting to re-litigate issues that have already been decided by our court. Also, Robert's Appellant's brief is not in compliance with Indiana Appellate Rule 46(A) as his statement of the case and statement of the facts contain argument rather than a recitation of the facts and procedural history. *See e.g.*, *Catellier v. Depco, Inc.*, 696 N.E.2d 75, 79 (Ind. Ct. App. 1998) (finding procedural bad faith where the Appellant's brief contained argument in the statement of the case and the statement of facts). Furthermore, in his brief, Robert failed to disclose the fact that there had been two prior appeals in this case, and in one of those appeals he raised many of the same issues. *See e.g.*, *Posey v. Lafayette Bank & Trust, Co.*, 512 N.E.2d 155, 156 (Ind. 1987) (finding bad faith where the Appellant failed to disclose a previous appeal raising many of the same issues). For all of these reasons, we find Robert's appeal to be frivolous and without merit, and we believe that an award of appellate attorney fees to Trisler is appropriate. Therefore, we remand to the trial court with instructions to determine and award an appropriate amount of appellate attorney fees.

Affirmed and remanded for proceedings consistent with this opinion.

BARNES and KIRSCH, JJ., concur.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF INDIANA DATED DECEMBER 6, 2000

IN THE COURT OF APPEALS OF INDIANA

No. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC., An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY,

Appellants-Plaintiffs,

v.

G. RAYMOND TRISLER,

Appellee-Defendant.

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Charles O'Connor, Judge
Cause No. 73C01-8803-CP-57

December 6, 2000

OPINION - FOR PUBLICATION

BAKER, Judge

This cause of action was born in 1987 and comes before us once again. *See Trisler v. Executive Builders, Inc.*, 647 N.E.2d 390 (Ind. Ct. App. 1995), *trans. denied.* Appellants-

plaintiffs and counter-defendants Executive Builders, Inc. (Executive Builders), Robert L. Montgomery and Dolores Montgomery (collectively referred to as "Executive") appeal the judgment entered in favor of appellee-defendant and counter-plaintiff G. Raymond Trisler. Specifically, Executive maintains that the judgment awarding Trisler $178,240 in compensatory damages and $1.64 million in punitive damages must be set aside because: 1) the trial court erred in refusing Executive's request to amend the pleadings to conform to the evidence; 2) the issue of "probable cause" with respect to Trisler's counterclaim for malicious prosecution should not have been presented to the jury; 3) the trial court did not respond adequately to inquiries that were made by the jury; 4) the trial court improperly read an instruction to the jury indicating that Trisler had prevailed on his complaint against Executive for interference; 5) the courtroom environment was substandard; 6) the trial court should have directed a verdict in favor of Executive, inasmuch as the evidence was not sufficient to support a verdict in Trisler's favor; and 7) the punitive damage award may not stand because it was based solely upon the jury's prejudice and passion. *See* Appellant's Brief at ii.

FACTS

The facts most favorable to the verdict are that Executive Builders, which was owned by Robert and Dolores Montgomery and a number of other individuals, purchased some real property in Greenwood in a development area known as Cielo Vista. The plan was to subdivide the property into sixty-lot units of condominium housing. While the estimated value of the land was approximately $900,000,

Executive paid a purchase price of $310,000 for its lots. Trisler owned and rented three of the seventeen units that had already been sold. In 1985, he moved to an adjoining subdivision but continued to rent his Cielo Vista units.

At one point, Dolores took it upon herself to amend certain Homeowner's Association (Association) documents in the subdivision to "properly reflect" the corporate status "as viewed by Executive Builders." *Trisler*, 647 N.E.2d at 391. Prior to Dolores's actions, Trisler had attempted to revive the Association by having another homeowner in the subdivision file an annual corporate report with the Indiana Secretary of State. In response, Executive appointed and/or elected a "purported" new Board of Directors and Officers for the Association. *Id.* Robert served as the self-appointed chairman of the Association. Dolores and other members of Executive were designated to serve three-year terms on the Association's Board of Directors. Record at 3429.

In May 1986, the Association placed a "special assessment" against the original seventeen unit owners, purportedly for repairs to the property. Approximately one year later, the Association attempted to place liens against the units on the basis of unpaid regular monthly assessments for the period between 1980 and 1985.

Trouble began to brew with respect to the levying of such "assessments" and Trisler, who believed that the charges brought by the Association were improper, consulted with legal counsel. Thereafter, Trisler maintained that the Board of Directors had been improperly appointed and that Executive owed the Association "thousands of dollars." R. at 2476.

In response, Robert immediately began accusing Trisler of wrongdoing. For instance, Robert sent a letter to all homeowners indicating that Trisler was desiring to "keep him and his friends in the rental property business and to protect their investments at your expense." R. at 3163-64. Robert sent additional correspondence to the property owners alleging that Trisler "would just as soon turn this community into a slum rental project." R. at 2863. After Robert discovered that his written correspondence had not produced any favorable result to him, he filed a complaint in the trial court on December 11, 1987, against Trisler, alleging "Intentional Interference with Business." R. at 51. The allegations asserted that Trisler had advised the homeowners in the development to withhold payment of their monthly fees and that he interfered with the Association "on an ongoing basis." R. at 59. Executive also maintained that Trisler utilized attorneys to create artificial legal obstacles, such as challenging the validity of all meetings of the Association and generally impeding the progress of Executive. R. at 59. Moreover, Executive asserted that Trisler deterred potential customers from making purchases of the condominium properties and maintained that Trisler's actions were done with the willful intent to injure and damage Executive which entitled it to punitive damages. R. at 63.

Trisler denied all allegations and proceeded to file a counterclaim against Executive Builders along with a third-party seven-count complaint against Robert and Dolores. Trisler sought damages for defamation, invasion of privacy, abuse of process and frivolous litigation. The trial court eventually entered summary judgment in favor of Trisler upon the complaint for business interference that Executive had filed against him.

Appendix B

Robert and Dolores continued their attack on Trisler. On February 7, 1988, the purported minutes of the annual meeting of the Association, held on June 14, 1987, were typed and distributed to the homeowners. Dolores was responsible for the contents of all such newsletters to the homeowners. R. at 2280. That newsletter cast Trisler in a derogatory and unfavorable light. R. at 2852-56.

Although summary judgment for Trisler was entered on February 21, 1990, the trial court vacated its order on March 31, 1994, in accordance with Executive's request. Trisler then appealed that order to this court, where we reversed the trial court and remanded the cause with instructions that the original judgment be reinstated with respect to the interference claim. *Trisler*, 647 N.E.2d at 394.

Following remand, Trisler's counterclaim and third-party complaint against Executive proceeded to trial on June 28, 1999. At the close of all evidence, Executive filed a motion for a directed verdict on the grounds that "Trisler did not, and could not identify any act that was committed individually by Robert . . . and/or Dolores." Appellant's brief at 24. The motions were denied and the jury proceeded to return verdicts in Trisler's favor against Executive Builders in the amount of $143,240, against Robert in the sum of $15,000 and against Dolores for $20,000, for a total judgment award of $178,240. Thereafter, a hearing was held on the issue of punitive damages. During that phase of the trial, it was determined that Robert's assets exceeded $16 million, the assets of Executive Builders was in a negative amount totaling hundreds of thousands of dollars and that Dolores earned an annual income of $15,000. Neither Robert nor

Dolores appeared at that juncture of the trial nor offered testimony in rebuttal of the asset values that had been established.

On June 8, 1999, the jury awarded punitive damages against Robert in the amount of $1.54 million and no punitive damages against Executive Builders or Dolores. The following day, Executive requested the trial court to vacate the jury award with respect to the total damage award. These motions were denied on October 18, 1999, and the trial court proceeded to enter judgment in the amount awarded by the jury. Thereafter, the trial court denied Executive's motion to correct error on December 22, 1999. Executive now appeals.

DISCUSSION AND DECISION

A. Amendment of Pleadings

Executive contends that the trial court erred in refusing its request to amend the pleadings to conform to the evidence. Specifically, Executive claims that it was entitled to assert the affirmative defense of "advice of counsel" following the presentation of the evidence, and further maintains that the trial court erred in refusing to give a final instruction with respect to this defense.

In general, the issues of a case are determined, not by the pleadings, but by the evidence produced at trial. *Svetich v. Svetich*, 425 N.E.2d 191, 193 (Ind. Ct. App. 1981). For an issue not raised by the pleadings to be litigated by implied consent, thereby permitting an amendment of the pleadings

to conform to the evidence presented at trial, both parties must know that the issue was being presented. *See Dotlich v. Dotlich*, 475 N.E.2d 331, 349-50 (Ind. Ct. App. 1985), *trans. denied.* With respect to the defense pertaining to advice of counsel, the appellant must show, by a preponderance of the evidence, that he acted in good faith and fully and truthfully made known to legal counsel all facts within his knowledge, or which could have been ascertained by the exercise of due diligence. *F.W. Woolworth Co. v. Anderson*, 471 N.E.2d 1249, 1255 (Ind. Ct. App. 1984), *trans. denied.* Additionally, one who desires to assert "advice of counsel" as a defense must also establish that such counsel was competent and disinterested. This showing is an essential prerequisite to the invocation of the defense. *Id.*

Here, Executive's counsel requested the trial court to give the following instruction which contained a portion of the language of Ind. Trial Rule 11(A):

> The signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.

Such an instruction was requested after testimony at trial indicated that Executive acted on advice of its counsel in pursuing the cause of action against Trisler. In refusing the instruction, the trial judge commented that:

> I will deny the Motion to Have the Pleadings Conform to the Evidence; however, there was

> evidence that, the Montgomerys testified that . . . the suit was filed after consultation with Mr. Thomas. So Mr. Raikos you may argue to the Jury that your clients caused the lawsuit to be filed after consulting with their attorney, but I'm not gonna give an Instruction that would advise the Jury that advice of counsel is an absolute defense because it was not pled affirmatively as I believe the Trial Rules require.

R. at 3763. Here, the record is devoid of testimony directly addressing the issue of advice of counsel as well as the extent of the information that was transmitted by Executive to its attorney. The evidence simply demonstrated that Executive had consulted with an attorney who then signed the interference complaint. Moreover, if Executive desired to rely upon the defense of "advice of counsel," Trisler could have delved into the accuracy and totality of the information provided to the attorneys by Executive at trial, as compared to the allegations actually contained in the interference complaint which were subsequently shown to be false. Moreover, documentary evidence including memoranda, diaries or summaries provided to counsel may have been subject to discovery in order to verify the information that Executive had transmitted to counsel. Finally, Executive set forth no evidence establishing the competency of any of the attorneys who represented it during the course of the twelve-year litigation. As a result, Executive's request to amend the pleadings to conform to the evidence was correctly denied by the trial court for failure to present evidence of all necessary elements of the purported defense of advice of counsel. *See F.W. Woolworth Co.*, 471 N.E.2d at 1255. Thus, the instruction as to this issue was also properly denied.

Appendix B

B. Probable Cause and Malicious Prosecution

Executive next urges that the issue of "probable cause" regarding the malicious prosecution claim should not have been submitted to the jury. Specifically, it contends that the existence of probable cause is purely a question of law and the trial court, rather than the jury, was obligated to determine its existence or nonexistence.

To resolve this issue, we note that to support a claim for malicious prosecution, the plaintiff must show the occurrence of legal action instituted by the defendant with malice and the absence of probable cause. *Costello v. Mut. Hosp. Ins. Inc.*, 441 N.E.2d 506, 508 (Ind. Ct. App. 1982). The plaintiff must also demonstrate that the litigation terminated in the plaintiff's favor and that damages resulted. *Id.* The determination of probable cause is normally an issue of fact for the jury's determination. When the facts are undisputed, however, probable cause is for the court to decide as a matter of law. *Id.*

In the instant case, it is readily apparent from the record that the facts Executive alleged in the interference complaint with regard to Trisler's alleged conduct are quite different from those that were presented by the testimony at trial. Inasmuch as the facts were disputed by the parties, the trial court did not err in permitting the jury to determine the issue of probable cause with respect to Trisler's claim for malicious prosecution.

Appendix B

C. Response to Jury Questions

Executive claims that it was denied a fair trial when the trial judge refused to provide the jury with a copy of the twenty-two final instructions that were read to it. Moreover, Executive maintains entitlement to reversal because the trial judge erred in not clarifying certain portions of the instructions during deliberations.

We note that the trial court's failure to answer the jury's questions during deliberation is not error *per se*, and the trial court must exercise discretion in determining whether certain inquiries of the jury should be answered. *Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc.*, 437 N.E.2d 1360, 1364 (Ind. Ct. App. 1982). In criminal cases, our supreme court has determined that the generally accepted procedure in answering a jury's question on a matter of law is for the trial court to *re-read* all the instructions and not to qualify, modify, or explain its instructions in any way. *Riley v. State*, 711 N.E.2d 489, 492 (Ind. 1999).

A panel of this court has determined that the practice of providing copies of the jury instructions to the jury is not recommended. *See Taylor v. Monroe County*, 423 N.E.2d 699, 701 (Ind. Ct. App. 1981). We note, however, that favorable results have been reached when written or taped instructions are provided to the jurors during deliberations. Amer. Bar Ass'n. Comm. on Jury Standards, *Standards Relating to Juror Use and Management*, 148 (rev. ed. 1993) (commenting on Standard 16(c)(ii)). Such a practice aids juror comprehension, and the ABA standards specifically call for such a procedure of making the instructions available to the jury during

deliberations. *Id.*[1] It has also been suggested that the effect of sending the instructions to the jury room may: a) increase juror confidence in their verdict, b) reduce deliberation time, and c) reduce the likelihood of disputes among jurors regarding the content and application of instructions. G. Thomas Munsterman, Paula Hannaford & G. Marc Whitehead, *Jury Trial Innovations* (1998 ed.). The Judicial Administration Committee of the Indiana Judicial Conference has also spoken on this issue and has recommended that final instructions should be provided to each juror during deliberations. Reports of the Citizens Comm'n for the Future of Indiana Courts and the Judicial Administration Committee of the Indiana Judicial Conference, *Juries for the 21st Century*, Vol. I, at 78 (2000).

In this case, the trial judge responded to the jury's questions by sending a note to them indicating that "All I can do is re-read the instructions." R. at 1583. While we believe that the preferred method would have been for the trial judge to have sent copies of the instructions to the jury room in accordance with the commentaries discussed above, we do not condemn his response to the questions made in accordance with our decision in *Taylor*. Thus, in light of our decision today, we find it acceptable for a trial judge to either re-read the instructions as suggested in *Taylor*, or to send unmarked copies of them to the jury room. Thus, in this case, there was no error.

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1. While such a practice may be acceptable, it is also imperative that if the instructions go back to the jury, they must be on a "clean" copy without indicating which of the parties may have submitted the instructions for the court's inclusion.

Appendix B

D. Jury Instruction as to Interference Claim

Executive claims that the trial court erred in instructing the jury that the Interference action it filed was ultimately decided in Trisler's favor. Specifically, it maintains that the instruction erroneously provided that the "issues on the merits" with respect to this issue had been decided. Appellant's brief at 20.

The portions of the instruction of which Executive complains provide that:

> The claim filed by Executive Builders, Inc. was ultimately resolved in favor of Ray Trisler and against Executive Builders, Inc. by decision of the Court of Appeals of Indiana on March 8, 1995.
>
> The remaining issues for your consideration are G. Ray Trisler's claims against Executive Builders, Inc. for abuse of civil process, wrongful intimidation, breach of fiduciary duties with respect to entrusted properties, intentional misconduct, malicious prosecution.
>
> Also remaining for your consideration are G. Ray Trisler's claims against Robert and Dolores Montgomery for abuse of civil process, wrongful intimidation, wrongful deception and/or mischief, breach of fiduciary duties with respect to entrusted properties, intentional misconduct, invasion of privacy, malicious prosecution and against Robert Montgomery for defamation.

R. at 1556-57.

Appendix B

We initially observe that Executive did not raise any objection to the above-quoted preliminary or final jury instruction at trial. Thus, the issue is waived. *Lewis v. Davis*, 410 N.E.2d 1363, 1368 (Ind. Ct. App. 1980). Waiver notwithstanding, we note that Trisler submitted evidence in an effort to establish his claim to summary judgment, and Executive proffered no evidence to the contrary. Moreover, Executive's failure to then timely file an appeal from that summary judgment order does not negate the result that the complaint for Interference was terminated in Trisler's favor on the merits. Thus, Executive's argument that this cause was "erroneously presented to the jury" must fail. *See* Appellant's brief at 34.

E. Environment of the Courtroom

Executive next claims that it was denied a fair trial because of the substandard conditions of the courtroom. Specifically, Executive contends that a new trial is warranted because of the existence of poor acoustics and the amount of "diffused sunlight" that was shining in counsel's face throughout the trial. Appellant's brief at 47.

We note that counsel for Executive voiced no complaints of such alleged "substandard" conditions during trial. The trial judge also addressed the jury at the onset of the case that traffic noise could be a problem and instructed jury members to raise their hand in the event anyone had difficulty hearing the testimony. R. at 1776. At no time during the trial did any juror express difficulty in hearing the proceedings, nor did anyone else in the courtroom so indicate. Finally, we note that Executive has not made any claims that it was prejudiced by such conditions. Thus, there was no error.

Appendix B

F. Sufficiency of the Evidence

Executive next contends that the evidence was insufficient to support the jury's verdict. Specifically, it maintains that the record reveals that the claims Trisler brought against Executive Builders, Robert, and Dolores merely showed a "churning" of attorney fees and an unwarranted request for punitive damages. *See* Appellant's brief at 19.

We initially observe that we will neither reweigh the evidence nor judge the credibility of witnesses. *F.W. Woolworth Co.*, 471 N.E.2d at 1253. Rather, we will consider only the evidence most favorable to the judgment along with all reasonable inferences which may be drawn from that evidence. *Id.* Only in those instances where the evidence points to a single conclusion different from the one reached by the trial court may we reverse on grounds of insufficient evidence. *Id.* While a verdict may be overturned if it is legally or logically inconsistent, contradictory or repugnant, this court indulges in every reasonable presumption in favor of legality of the jury's verdict. *Emerson v. Markle*, 539 N.E.2d 35, 39 (Ind. Ct. App. 1989), *trans. denied.*

As set forth in the *FACTS*, Trisler's counterclaim and third-party complaint filed against Executive sought damages for defamation, invasion of privacy, abuse of process and frivolous litigation with respect to Executive's complaint for interference. R. at 517-31. From the evidence presented at trial, it is apparent that Robert issued a number of false statements in the complaint against Trisler. Even more

compelling, the evidence reveals that the true purpose of Executive's causes of action against Trisler was to use the litigation as a sham for asserting false and malicious allegations against him for the purpose of damaging Trisler's integrity and reputation.

Even at trial, Robert answered "you bet" when asked whether he had filed the complaint against Trisler to "shut him up." R. at 2850. The evidence revealed that none of the individuals that Robert had identified as those who decided not to purchase a residence in the subdivision from Trisler had even heard of Trisler. R. at 1981-82, 2203. Rather, it was demonstrated that one of the prospective purchasers had retracted his offer when Dolores refused to make good on her promise to perform repairs on one of the units. R. at 1979-81, 1995-96. Moreover, potential buyers named in several of the discovery documents did not even exist until *after* Executive's complaint had been filed. At least one witness testified that he was unaware of anyone who did not purchase the property at Cielo Vista because of Trisler's alleged wrongdoings. R. at 2163-64.

Additionally, while Robert claimed that Trisler had assaulted him in 1985 by "jabbing him with his forefinger," the evidence at trial showed that this incident never occurred. R. at 3154. A number of other allegations regarding Trisler's "wrongdoings" that Executive alleged in the interference complaint were also shown to be false. R. at 1967-71. An incident demonstrating intimidation included Robert's pounding on Trisler's front door at 5:30 a.m. on one occasion. R. at 3165, 3261-62, 3546. Further, Dolores falsely reported to the Board of Directors of the Association

that Trisler had stolen property and referred to Trisler in her deposition as "slime" and "disease." R. at 2992.

In reviewing the evidence that was presented at trial, it is apparent that Robert and Dolores engaged in a personal crusade throughout the pendency of this action which was designed to intentionally and maliciously destroy Trisler's reputation and peace of mind. The evidence overwhelmingly demonstrated that Robert and Dolores acted maliciously toward Trisler. Thus, we decline to disturb the jury's verdict.

G. Punitive Damages

Robert next claims that the award of punitive damages was erroneous. Specifically, Robert argues that the judgment may not stand because there was no showing that his actions were malicious, oppressive and intentional. Moreover, Robert maintains that the award violated his rights to due process under the United States Constitution and Indiana Constitution in that the amount awarded was impermissibly excessive.

To resolve this issue, we initially observe that the standard of review for punitive damages is whether, considering only the probative evidence and the reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find by clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing. *Budget Car Sales v. Stott*, 662 N.E.2d 638, 639 (Ind. 1996), *trans. denied.*

Appendix B

We also note that a judgment that is a product of fair procedures is cloaked with a strong presumption of validity. *Coachmen Indus. Inc. v. Dunn*, 719 N.E.2d 1271, 1278 (Ind. Ct. App. 1999), *trans. denied.* Particularly, where impartial jurors were selected; the jurors heard all the evidence presented by both sides; the trial court properly instructed the jury on the law; and the trial court upheld the punitive award after considering its constitutionality, there is a presumption that the award is constitutional. *Id.*

Finally, we note that when reviewing the amount of punitive damages that are awarded, the following guideposts are used to determine whether an award is grossly excessive: 1) the degree of reprehensibility of the conduct at issue; 2) the disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received; and 3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561-62 (Ind. Ct. App. 1999), *trans. denied.* Each case must be analyzed on its own facts, considering the guideposts set forth above, as well as other factors. *Coachmen*, 719 N.E.2d at 1278. Moreover, the economic wealth of the defendant should be considered when determining the amount of punitive damages that should be awarded. *Ammerman*, 705 N.E.2d at 563. Economic wealth considerations are necessary based upon the theory that it will take a greater penalty to dissuade the rich than the poor from engaging in oppressive conduct. *Ramada Hotel Operating Co. v. Shaffer*, 576 N.E.2d 1264, 1268 (Ind. Ct. App. 1991).

Appendix B

Contrary to Robert's challenge to the constitutionality of the punitive damages award, the record reflects that impartial jurors were selected to hear the cause; the jurors heard all the evidence; the trial court properly instructed the jury; and the trial court considered Robert's argument of unconstitutionality in its motion to correct error, which it denied. Thus, the award is presumed to be constitutionally valid. *See Coachmen*, 719 N.E.2d at 1278.

In the instant case, Trisler testified that Executive's cause of action resulted in nearly six years of sleeplessness, mental anguish, depression and nervousness. R. at 3531. Trisler was frightened by Robert's actions and he believed that his neighbors and co-owners placed blame on him for the dispute that the Montgomerys had publicized. As set forth above, the evidence at trial demonstrated that Robert purposely and maliciously orchestrated and financed a false and frivolous cause of action against Trisler. Robert also conducted other public attacks on Trisler in an effort to ruin Trisler's reputation and standing within his own community and neighborhood. As a result, we cannot say that the award of punitive damages was error.

With respect to the amount of punitive damages that were awarded, we note that the ratio of those damages to compensatory damages was approximately nine to one. Contrary to Executive's claim, such an award is not error. In *Emerson v. Markle*, 539 N.E.2d at 40-41, we determined that a punitive damage award which was 150 times larger than the actual damage award was not excessive. Just as the facts show here, the *Emerson* case involved a personal crusade on the part of the defendant which was designed to

intentionally and maliciously destroy an individual's reputation, peace of mind, and career. *Id.* at 40. Here, the jury heard evidence that Robert's economic wealth amounted to at least $16 million. The punitive damage award was approximately ten percent of that amount. Thus, it can hardly be said that leaving Robert with 90% of his wealth is oppressive in light of his conduct and attempts to destroy Trisler in a number of ways. An award of a lesser amount may well have been insufficient to punish Robert for his conduct and to deter him and others from engaging in such conduct in the future.

Finally, we reject Robert's argument that the amount of punitive damages awarded should be limited to three times the compensatory damages or $50,000, whichever is greater, in accordance with IND. CODE § 34-51-3-4. This statute, which became effective on July 1, 1998, does not apply to this cause, inasmuch as the litigation commenced in 1987, prior to its enactment. The legislature did not see fit to make this statute retroactive. Therefore, Trisler's recovery is not limited under the provisions of this statute.

Appendix B

CONCLUSION

In light of our disposition of the issues set forth above, we conclude that the trial court properly denied Executive's request to amend its pleadings to conform to the evidence. Additionally, the issue of probable cause regarding the malicious prosecution claim was properly submitted to the jury, and the trial court properly addressed the questions posed by the jury during trial. Moreover, the jury was correctly instructed with respect to Executive's claim against Trisler for interference, and Executive may not succeed on its claim that it was entitled to a new trial because of the purported substandard conditions of the court room. Finally, we conclude that sufficient evidence was presented to support the award of compensatory and punitive damages in favor of Trisler.

Judgment affirmed.

BAILEY, J. and VAIDIK, J., concur.

APPENDIX C — JUDGMENT OF THE SHELBY CIRCUIT COURT DATED AND FILED OCTOBER 18, 1999

IN THE SHELBY CIRCUIT COURT

CAUSE NO. 73C01-8803-CP-057

STATE OF INDIANA)
) SS.
COUNTY OF SHELBY)

EXECUTIVE BUILDERS, INC.,
an Indiana Corporation,

Plaintiff and
Counter-Defendant

vs

G. RAYMOND TRISLER,

Defendant,
Counter-Plaintiff and
Third-Party Plaintiff

vs

ROBERT MONTGOMERY and
DOLORES MONTGOMERY,

Third-Party
Defendants

Appendix C

JUDGMENT

Court enters Judgment on Jury Verdict for Plaintiff, Ray Trisler, and against Defendant, Executive Builders, Inc., in the amount of One Hundred Forty-three Thousand Two Hundred Forty Dollars ($143,240.00).

Court enters Judgment on Jury Verdict for Plaintiff, Ray Trisler, and against Defendant, Robert Montgomery, in the amount of Fifteen Thousand Dollars ($15,000.00).

Court enters Judgment on Jury Verdict for Plaintiff, Ray Trisler, and against Defendant, Dolores Montgomery, in the amount of Twenty Thousand Dollars ($20,000.00).

Court enters Judgment on Jury Verdict for Plaintiff, Ray Trisler, and against Defendant, Robert Montgomery, for punitive damages in the amount of One Million Six Hundred Forty Thousand Dollars ($1,640,000.00).

ORDERED this 18th day of October, 1999.

s/ Charles D. O'Connor
Charles D. O'Connor, Judge
Shelby Circuit Court

Distribution:
John D. Raikos
Michael E. Simmons

APPENDIX D — LETTER TO JOHN RAIKOS FROM CLERK OF THE SUPREME COURT, COURT OF APPEALS, AND TAX COURT, STATE OF INDIANA DENYING APPELLANT'S PETITION FOR TRANSFER OF JURISDICTION DATED NOVEMBER 7, 2002

CLERK
SUPREME COURT, COURT OF APPEALS,
AND TAX COURT
STATE OF INDIANA
217 State House, Indianapolis, IN 46204
317-232-1930 • Fax 317-232-8365

Brian Bishop
Clerk

JOHN RAIKOS
1800 MERIDIAN ST, STE 408
P.O. BOX 44444
INDIANAPOLIS, IN 46244

Cause Number
73A01-0203-CV-00103
Lower Court Number:
73C018803CP057

EXECUTIVE BUILDERS, INC. -V- TRISLER, G. RAYMOND

You are hereby notified that the SUPREME COURT has on this day 11/07/02

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER

Appendix D

JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court,
this 7th day of November, 2002

s/ Brian Bishop
Clerk